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NO. 82-649

in the Supreme Court of the United States

October Term, 1982

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida Corporation
Petitioners,

vs.

THE CITY OF HOMESTEAD, FLORIDA, A Florida Municipal Corporation,
Respondents.

On Petition For Writ of Certiorari From The United States Court of Appeals For the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

JOHN S. FREUD, ESQUIRE
of Counsel
GUREN, MERRITT, UDELL, SOGG & COHEN
1200 Brickell Avenue
Miami, Florida 33131
(305) 372-0122

H. JACK KLINGENSMITH, ESQUIRE
GUREN, MERRITT, UDELL, SOGG & COHEN
8th Floor
1200 Brickell Avenue
Miami, Florida 33131
(305) 372-0122
Attorney for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii-vi

STATEMENT OF THE CASE 1-2

GROUNDS WHY THIS CAUSE SHOULD NOT BE REVIEWED

I. SUMMARY 3-4

A. THERE IS NO SUBSTANTIAL CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL

B. THE UNITED STATES SUPREME COURT HAS HELD THAT MUNICIPALITIES CAN CONSTITUTIONALLY REGULATE OR PROHIBIT THE DISSEMINATION OR PROLIFERATION OF DRUG PARAPHERNALIA

C. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS UPHOLDING THE HOMESTEAD ORDINANCE IS CORRECT

TABLE OF CONTENTS (Continued)

Page

D. PETITIONERS HAVE FAILED TO COMPLY WITH RULE 21.1(b), S.CT. U.S., i.e. ALL PARTIES TO THE PROCEEDINGS IN THE ELEVENTH CIRCUIT HAVE NOT BEEN LISTED IN THE PETITION

II. VAGUENESS

A. "DESIGNED FOR USE" 5-7

B. "LEGITIMATE SUPPLIER" 7-9

C. "REASONABLY SHOULD KNOW" 9-11

III. OVERBREADTH 11-15

IV. CONCLUSION 16

APPENDIX:

Order Denying Preliminary Injunction Entered By District Court RA.2-7

Final Judgment Entered by District Court RA.8

Resolution No. 80-07-21 City of Homestead, Florida RA.9-11

TABLE OF AUTHORITIES

Cases	Pages
Atkins v. Clements, 529 F.Supp. 735 (N.D. Tex. 1981), Appeal Dismissed ___ F.2d ___ (5th Cir. 1981)	3
Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222 (1975)	14, 15
Brache v. County of Westchester, 658 F.2d 47 (2d Cir. 1981)	3
B. S. v. State, 320 So.2d 459 (Fla. 3d Dist. Ct. App. 1975)	11
Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981), *cert. den.* ___ U.S. ___, ___, S.Ct. ___, 71 L.Ed.2d ___, 50 U.S.L.W. 3713 (U.S. 3/8/82)	3, 5, 12
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)	12
Deleware Accessories Trade Association v. Gebelein, 497 F.Supp. 289 (D. Del. 1980)	5
Florida Businessmen, Etc. v. City of Hollywood, 673 F.2d 1213 (11th Cir. 1982)	3, 6, 9, 14
Florida Businessmen, Etc. v. City of Homestead, 679 F.2d 252 (11th Cir. 1982)	4

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Gorin v. United States, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed.488 (1941)	11
Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)	5
Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981)	3, 5
High Ol'Times, Inc. v. Busbee, 673 F.2d 1225 (11th Cir. 1982)	3, 5
Hutton v. State, 332 So.2d 686 (Fla. 1st. Dist. Ct. App. 1976)	11
Mid-Atlantic Accesories Trade Association v. Maryland, 500 F.Supp. 834 (D. Md. 1980)	5
Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed.940 (1934)	13
New England Accessories Trade Association, Inc. v. City of Nashua, 679 F.2d 1 (1st Cir. 1982)	3
Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973)	12

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Record Head Corporation v. Sachen, 682 F.2d 672 (7th Cir. 1982)	4
Record Revolution No. 6 v. City of Parma, 638 F.2d 916 (6th Cir. 1980), vacated and remanded, 451 U.S. 103 (1981), previous decision reaffirmed and reinstated, Nos. 80-3308 and 80-3352 (6th Cir. 1/6/82), vacated and remanded, ___ U.S. ___, 102 S.Ct. 2227, 69 L.Ed.2d 384 (1982)	3
Selzman v. United States, 268 U.S. 466, 45 S.Ct. 574 (1925)	10
United States v. Featherston, 461 F.2d 1119 (5th Cir. 1972), *cert. den.* 409 U.S. 991 (1972)	10
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., ___ U.S. ___, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)	4, 6, 7, 9, 11, 13, 16
Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)	12
Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed.563 (1955)	13

TABLE OF AUTHORITIES (Continued)

Cases	Pages
World Imports, Inc. v. Woodbridge Township, 493 F.Supp. 428 (D.N.J. 1980), appeal dismissed ____ F.2d ____ (3rd Cir. 1980)	3, 5
STATUTORY PROVISIONS	
Florida Statutes, Sections 893.145-.147 (Supp. 1982)	14
Model Drug Paraphernalia Act	3
Ordinance No. 80-04-28, City of Homestead Code of Ordinances	1, 4, 7, 8
Resolution No. 80-07-21, City of Homestead Code of Ordinances	9
Rule 21.1(b), Rules of The Supreme Court of The United States	4
Title 8, United States Code, Section 1185 (a)(2)	10
Title 15, United States Code, Sections 78dd-1, 78dd-2, 1397, 1916, 2068, 2614	10
Title 18, United States Code, Sections 922, 954, 1384, 2154, 2423, 2512, 4921	10
Title 26, United States Code, Section 999	10
Title 42, United States Code, Sections 263, 5409	10
Title 46, United States Code, Section 1461	10

STATEMENT OF THE CASE

Respondent adopts Petitioners' Statement of the Case with the following exceptions:

THE ORDINANCE

On April 21, 1980, the City of Homestead, Florida duly enacted Ordinance No. 80-04-28 in an effort to stem the tide of drug abuse by restricting the dissemination of drug paraphernalia within its borders.

The Homestead Ordinance is divided into five (5) parts, the thrust of which is to prohibit (1) the use or possession, (2) the manufacture or delivery and (3) the advertisement of "drug paraphernalia".

The heart of the ordinance is its definition of the term "drug paraphernalia" which is set forth in Section 29-58.1. (A.3-8).

Supplementing this definition are twelve (12) subsections of the ordinance which detail a non-exclusive list of objects which are considered "drug paraphernalia" when used, intended for use or designed for use by an individual in conjunction with controlled substances. (A.4-6). The ordinance also delineates fourteen (14) factors which may be considered in determining whether a particular object is "drug paraphernalia". (A.7-8).

The definition of "drug paraphernalia" does not stand alone. Three separate sections of the ordinance identify those activities which are unlawful and each of those sections incorporates the definition of "drug paraphernalia" by reference. (A.8-9).

THE PROCEEDINGS BELOW

Petitioners' application for the issuance of a preliminary injunction was denied by the District Court which found that there had been no showing of arbitrary or discriminatory enforcement of the Ordinance by the City of Homestead. (RA.2-7).

Petitioners' alleged arbitrary and discriminatory enforcement in their amended complaint (A.15), but shortly after the Ordinance was enacted Petitioners and Respondent concluded negotiations which resulted in the adoption of a resolution by the City staying enforcement of the ordinance against the Petitioners. (RA.9-11).

At the hearing on the motions for summary judgment Petitioners offered no proof of selective enforcement and actually conceded that the Ordinance had not been enforced against them. (A.24-30).

In granting summary judgment for the City, the District Court concluded that Petitioners' allegations of selective enforcement, discriminatory intent and systematic design to harass were not supported by the record. (A.31).

GROUNDS WHY THIS CASE SHOULD NOT BE REVIEWED

I. SUMMARY

The petition for writ of certiorari filed by the Petitioners attacks the Homestead Ordinance on the grounds that it is unconstitutionally vague and overbroad. Nevertheless, it is respectfully submitted that the Court should not grant review of the petition because:

a) There is no substantial conflict in the decisions of the Circuit Courts of Appeal which have considered the constitutionality of statutes or ordinances based on the Model Drug Paraphernalia Act (M.D.P.A.);[1]

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[1]The Courts of Appeal which have approved legislation based on the M.D.P.A. include the First, Second, Third, Fifth, Eighth, Tenth and Eleventh. See *New England Accessories Trade Association, Inc. v. City of Nashua*, 679 F.2d 1 (1st Cir. 1982); *Brache v. County of Westchester*, 658 F.2d 47 (2d Cir. 1981); *World Imports, Inc. v. Woodbridge Township*, 493 F.Supp. 428 (D.N.J. 1980), appeal dismissed ___ F.2d ___ (3d Cir. 1980); *Atkins v. Clements*, 529 F.Supp. 735 (N.D. Tex. 1981), appeal dismissed ___ F.2d ___ (5th Cir. 1981); *Cashbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. denied* ___ U.S. ___, ___ S.Ct. ___, 71 L.Ed.2d ___, 50 U.S.L.W. 3713 (U.S. 3/8/82); *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981); *High Ol'Times, Inc. v. Busbee*, 673 F.2d 1225 (11th Cir. 1982); *Florida Businessmen, Etc. v. City of Hollywood*, 673 F.2d 1213 (11th Cir. 1982).

In contrast, only the Sixth and Seventh Circuits have struck down drug paraphernalia statutes or ordinances spawned by the M.D.P.A. See *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (6th Cir. 1980), vacated and remanded, 451 U.S. 103 (1981), previous decision reaffirmed and reinstated, Nos. 80-3308

b) In *Village of Hoffman Estates v. Flipside*, ____ U.S. ____, 102 S.Ct. 1186, 71 L.Ed.2d 362(1982), this Court unanimously held that municipalities can regulate or prohibit the dissemination or proliferation of drug paraphernalia without violating Constitutional safeguards;

c) The decision of the Eleventh Circuit Court of Appeals upholding the Homestead Ordinance (No. 80-04-28) is correct;[2] and

d) Petitioners have failed to comply with Rule 21.1(b), S.Ct. U.S., i.e. all parties to the proceedings in the Eleventh Circuit have not been listed.[3]

(Footnote 1 Continued)

and 80-3352 (6th Cir. 1/6/82), vacated and remanded, ____ U.S. ____, 102 S.Ct. 2227, 69 L.Ed.2d 384 (1982); *Record Head Corporation v. Sachen*, 682 F.2d 672 (7th Cir. 1982). However, the United States Supreme Court has on two separate occasions rejected the Sixth Circuit's decision and in *Hoffman Estates* gave the Seventh Circuit advance notice of its unequivocal approval of municipal legislation aimed at the activities of head shops.

[2]*Florida Businessmen, Etc. v. City of Homestead*, 679 F.2d 252 (11th Cir. 1982).

[3]The following persons were also named Defendants in the proceedings below: Nicholas R. Sincore, William F. Dickinson, Ruth L. Campbell, William M. McConnell, Walter Rutzke, William Tommy Wilson and Irving Peskoe.

II. VAGUENESS

A. "Designed for Use"

Petitioners launch their assault on the Ordinance by claiming that the phrase "designed for use" found in the definition of "drug paraphernalia" fails to give fair notice which items are prohibited and who is intended as the designer. From this starting point Petitioners argue that the Ordinance permits an accused to be prosecuted and convicted based on the transferred intent of another person.

The standards established by this Court for evaluating vagueness reflect that a municipal ordinance will survive a vagueness challenge if it (1) gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited so he may avoid prosecution and (2) provides explicit standards for its enforcement.[4]

Numerous District Courts and Courts of Appeal have concluded that the term "designed for use" satisfies the vagueness criteria adopted by this Court.[5] Furthermore, this Court recently concluded that "designed

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[4]See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972).

[5]See, e.g., *Casbah, Inc.* v. *Thone*, *supra*; *Hejira Corp.* v. *MacFarlane*, *supra*; *High Ol'Times, Inc.* v. *Busbee*, *supra*; *Florida Businessmen, Etc.* v. *City of Hollywood*, *supra*; *World Imports, Inc.* v. *Woodbridge*, *supra*; *Deleware Accessories Trade Association* v. *Gebelein*, 497 F.Supp. 289, 291-92 (D.Del. 1980); *Mid-Atlantic Accessories Trade Association* v. *Maryland*, 500 F.Supp. 834, 844-45 (D.Md. 1980).

for use" encompasses items principally used with illegal drugs (1) because of their objective physical features designed by the manufacturer and (2) because a business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer.[6]

Petitioners attempt to distinguish *Hoffman Estates.* However, their arguments are matters of form rather than substance and are calculated to distort the plain, simple and readily understandable language of the Homestead Ordinance. For example, Petitioners emphasize that the Homestead Ordinance, unlike *Hoffman,* does not contain the additional phrase "marketed for use". Petitioners ignore the fact that in addition to the "designed for use" phrase the Homestead Ordinance includes two other states of mind on which the definition of drug paraphernalia depends, i.e. "used" or "intended for use". Furthermore, to insure that Defendants will not be convicted on the transferred intent of others the Eleventh Circuit declared that each of these three states of mind require proof of general criminal intent of the accused.[7] Therefore, it is submitted that no substantive distinction exists between the Homestead Ordinance in which "designed for use" is supplemented by "used" and "intended for use" and the Hoffman Ordinance where "marketed for use" appears as the sole companion of "designed for use". Regardless of

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[6] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ___ U.S. ___ 102 S.Ct. 1186, 1195, 71 L.Ed.2d 362 (1982).

[7] *Florida Businessmen, Etc. v. City of Hollywood, supra.*, at p. 1219.

the semantics each of the ordinances require proof of the alleged violator's intent.

Petitioners also argue that *Hoffman* is different because it involved a civil licensing ordinance rather than a criminal law which requires greater constitutional scrutiny. However, in *Hoffman Estates* this Court applied a relatively strict vagueness standard because the Ordinance under review was quasi-criminal in nature. 102 S.Ct. at 1194.

The Homestead Ordinance distinguishes between lawful and prohibited objects by scrutinizing the intent of the possessor or user. Innocent objects and users of such items do not fall within the ambit of the Ordinance. Accordingly, "designed for use" does not render the Ordinance unconstitutionally vague.

B. "Legitimate Supplier"

The Homestead Ordinance defines and then prohibits the possession, delivery, manufacture and advertisement of "drug paraphernalia". At the very core of the Ordinance is the definition of the term "drug paraphernalia".[8] Supplementing this definition are twelve (12) subsections detailing a non-exclusive list of objects which are considered "drug paraphernalia" when used, intended for use or designed for use with controlled substances.[9] In addition, the Ordinance also delineates fourteen (14) logically relevant factors which *may* be considered in

[8]Homestead Ordinance Sec. 29-58.1 (A. 4).

[9]Homestead Ordinance Sec. 29-58.1 (A. 4-5).

determining whether a particular object is "drug paraphernalia".[10]

Petitioners limit their vagueness challenge to only one of these fourteen (14) factors—the factor of whether the owner or anyone in control of a particular object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products[11]—claiming that it clouds rather than clarifies prohibited conduct and encourages arbitrary and discriminatory enforcement.

Petitioners' argument on this issue is unsound. First of all, consideration of the "legitimate supplier" factor is permissive, not mandatory. Secondly, it is supplemented by an example which distinguishes head shops covered by the Ordinance from other retail establishments which might sell objects capable of being used for both innocent and unlawful reasons. Thus, the "legitimate supplier" factor does not confuse or cloud prohibited conduct, but actually aids in providing clear, precise notice to potential Defendants of what conduct is unlawful under the Ordinance.

Likewise, the "legitimate supplier" factor does not encourage discriminatory or arbitrary enforcement. Petitioners argued selective enforcement in the proceedings below, but introduced no evidence to support their charges. Furthermore, the overwhelming weight of the evidence before the District Court established

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[10]Homestead Ordinance Sec. 29-58.1 (A. 7-8).

[11]Homestead Ordinance Sec. 29-58.1 (A. 8).

that the Ordinance had never been enforced against the Petitioners.[12] Moreover, as this Court pointed out in *Hoffman Estates* a facial challenge to the constitutionality of an ordinance is not the appropriate time to litigate claims of selective enforcement even though the risk of discriminatory enforcement may be present.[13] The Eleventh Circuit was correct in finding that the Homestead Ordinance has been drafted with sufficient clarity that the speculative danger of discriminatory and arbitrary enforcement does not make it void for vagueness. Petitioners' claims of selective enforcement should be reviewed only when the possibility of enforcement has ripened into actual prosecution.[14]

C. "Reasonably Should Know"

Petitioners also challenge the Homestead Ordinance for vagueness on the ground that the "reasonably should know" standard found in the violations portion will allow convictions based on constructive knowledge without requiring specific intent.

The "reasonably should know" standard has been approved by virtually every court which has been asked to interpret drug paraphernalia legislation based on

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[12]See Order Denying Preliminary Injunction, (RA. 2-7); Petitioners' Brief, pp 5-6; Resolution No. 80-07-21, City of Homestead (RA. 9-11); and Order Granting Summary Judgment (A. 31-32).

[13]*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra.*, at 1196.

[14]*Florida Businessmen, Etc. v. City of Hollywood, supra.*, at 1220.

the M.D.P.A. The rationale of these decisions is that for all practical purposes "reasonably should know" means and requires actual knowledge.[15] Furthermore, this standard forms the basis of numerous federal statutes[16] and has been upheld in many other contexts.[17]

Against this backdrop of authority Petitioners rely heavily on the skewed reasoning of the Sixth Circuit in *Record Revolution No. 6 v. City of Parma*, a decision which this Court has on two prior occasions rejected.

Petitioners are correct in their observation that the ordinance in *Hoffman Estates* did not contain a "reasonably should know" standard. However, this Court brushed aside all vagueness attacks in *Hoffman* on the

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[15]See footnote 1, *supra*.

[16]*See, e.g.*, 8 U.S.C. Section 1185(a)(2); 15 U.S.C. Sections 78dd-1, 78dd-2, 1397, 1916, 2068, 2614; 18 U.S.C. Sections 4921, 922, 954, 1384, 2154, 2423, 2512; 26 U.S.C. Section 999; 42 U.S.C. Sections 263, 5409; 46 U.S.C. Section 1461.

[17]*See, e.g., Selzman v. United States*, 268 U.S. 466, 45 S.Ct. 574 (1925) (sale of denatured alcohol for beverage purposes or under circumstances from which the seller might reasonably have inferred the intent of the purchaser to use it for such purposes); *United States v. Featherston*, 461 F.2d 1119 (5th Cir. 1972), *cert. denied*, 409 U.S. 991 (1972) (teaching or demonstrating use of fire arms, knowing or having reason to know that the same will be unlawfully fully employed . . .). In fact, the two cases cited above went further than the M.D.P.A. in that the courts in those cases upheld the principle that a seller may be required to ascertain the intent of the purchaser without requiring specific intent on the part of the seller.

grounds that the ordinance under scrutiny required scienter or a specific intent to violate its provisions.[18]

It is also important to note that enforcement of "drug paraphernalia" legislation in Florida demonstrates that our state courts have likewise construed the "reasonably should know" standard to require proof of actual knowledge or scienter.[19]

The "reasonably should know" standard provides fair notice to persons of ordinary intelligence of its meaning and application.[20] This standard does not punish innocent or inadvertent conduct, but establishes a scienter requirement. For Petitioners to complain that such a standard requiring actual knowledge is vague is an exercise in absurdity.

III. OVERBREADTH

Petitioners assail the advertising prohibition found in the Homestead Ordinance[21] on the grounds that it is overbroad both as to the types of speech which are

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[18]*Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., supra.*, at 1195.

[19]*Hutton v. State*, 332 So.2d 686, 687 (Fla. 1st Dist. Ct. App. 1976); *B.S. v. State*, 320 So.2d 459, 461 (Fla. 3d Dist. Ct. App. 1975).

[20]*Gorin v. United States*, 312 U.S. 19, 27-28, 61 S.Ct. 429, 433-434, 85 L.Ed. 488 (1941); *United States v. Featherston, supra; Selzman v. United States, supra.*

[21]Homestead Ordinance Sec. 29-58.4. (A. 9).

restrained and the geographical scope of the restrictions imposed.

Contrary to the unsupported rhetoric of the Petitioners, the Ordinance does not prohibit symbolic or political speech. The clear, unequivocal language of the Ordinance demonstrates that it has been narrowly drawn to regulate only commercial speech which promotes commercial transactions. Equally obvious is the fact that the Ordinance only prohibits advertisements which promote the sale of "drug paraphernalia". Therefore, the Ordinance bans only commercial speech which involves an illegal activity.

The overwhelming weight of authority recognizes that government may prohibit commercial speech which promotes or involves illegal activity or conduct and such speech is not entitled to the protection of the First Amendment.[22]

Petitioners on the other hand take false comfort in their assertion that the Court did not address this issue in *Hoffman Estates*. However, a close reading of *Hoffman* not only indicates that the Court did in fact consider Flipside's free speech objections to the ordinance, but also that the Court summarily rejected them:

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[22] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 2350-51, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973); *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 761, 96 S.Ct. 1817, 1925, 48 L.Ed.2d 346 (1976); *Casbah, Inc. v. Thone, supra*.

. . . ."The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed 'speech' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. . . ."

At 102 S.Ct. 1192.

Furthermore, in *Hoffman* the Court observed that it was irrelevant whether the ordinance was overbroad in scope because the overbreadth doctrine does not apply to commercial speech.[23]

The geographical overbreadth argument proffered by the Petitioners is also without merit. The primary thrust or purpose of the Ordinance is to curtail drug abuse within the geographical borders of Homestead, Florida. Homestead has a legitimate interest in stemming the tide of drug abuse which adversely affects the public health, safety, morals and general welfare.[24] Moreover, in deciding what means to employ Homestead can rely on actual or hypothetical facts and can attack only certain aspects of the problem without having to justify its failure to fashion a comprehensive solution.[25] To accomplish its objective the City has enacted legislation

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[23] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, *supra.*, at 1192.

[24] *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934).

[25] *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

which makes advertisements promoting the sale of "drug paraphernalia" unlawful. Therefore, it is clear that the Ordinance bans such advertising only within the city limits of Homestead. Likewise, it is obvious that the Ordinance only reaches advertising which promotes the sale of drug paraphernalia in Homestead and not in other jurisdictions.

Nevertheless, even assuming the Ordinance attempted to regulate advertising promoting an activity in another community, it would not run afoul of constitutional safeguards because the activity focused on, i.e. the possession, manufacture or delivery of "drug paraphernalia", is illegal throughout the State of Florida.[26] Furthermore, the advertisement of drug paraphernalia in Florida has also been criminalized on a state-wide level.[27] It should also be remembered that these very same Petitioners challenged the constitutionality of the State of Florida's ban on "drug paraphernalia" and the validity of that legislation was upheld by the Eleventh Circuit.[28] Petitioners did not, however, elect to appeal that decision of Eleventh Circuit.

In a belated effort to lend credibility to their geographical overbreadth argument, Petitioners mistakenly rely on *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222 (1975). In *Bigelow*, this Court pointed out that the Virginia statute in question had been amended

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[26]Fla.Stat. Secs. 893.145-.147 (Supp. 1982).

[27]Fla.Stat. Sec. 893.147(4) (Supp. 1982).

[28]*Florida Businessmen, Etc. v. City of Hollywood, supra.*

to prohibit advertising which encouraged abortion only in Virginia and that as a result of this amendment the issue of overbreadth had become moot for the future. Accordingly, the Court specifically declined to rest its decision on overbreadth.[29] The Court also noted that the advertisement under review, unlike the one considered in the *Pittsburgh Press* case, did more than propose a commercial transaction; it also encompassed and communicated information and opinion of potential interest and value to the public.[30]

In stark contrast to the statute in *Bigelow* the Homestead Ordinance aims only at pure commercial speech which promotes or involves illegal activity or conduct. It does not under even a strained interpretation apply to the communication of information or the dissemination of opinion of potential interest and value to the public, nor does it impede the flow of information about an activity which is legal in another community.

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[29] *Bigelow v. Virginia*, 421 U.S. 809, 818, 95 S.Ct. 2222, 2230 (1975).

[30] *Bigelow v. Virginia*, 421 U.S. at 821, 95 S.Ct. at 2232.

IV. CONCLUSION

Respondent respectfully submits that the Homestead Ordinance is neither vague or overbroad, nor does it infringe on any First Amendment rights.

The constitutionality of drug paraphernalia legislation patterned as the Homestead Ordinance is after the M.D.P.A. has been upheld by all but two of the Circuit Courts which have considered the issue. Furthermore, in *Hoffman Estates* this Court settled the issues raised by the Petitioners in this case.

Accordingly, the Petition for writ of certiorari filed by the Petitioners should be denied.

RESPECTFULLY SUBMITTED,

H. JACK KLINGENSMITH,
Esquire
Counsel of Record
GUREN, MERRITT, UDELL,
SOGG & COHEN
8th Floor
1200 Brickell Avenue
Miami, Florida 33131
(305) 372-0122

JOHN S. FREUD, Esquire
Of Counsel
GUREN, MERRITT, UDELL,
SOGG & COHEN
8th Floor
1200 Brickell Avenue
Miami, Florida 33131
(305) 372-0122

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

[FILED MAY 23 1980]

[RECEIVED MAY 27 1980]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1160-Civ-JCP

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, an unincorporated association, and MERLIN'S MUSIC, INC., a Florida Corporation,

Plaintiffs,

v.

THE CITY OF HOMESTEAD, FLORIDA, A Florida municipal corporation,

Defendant.

ORDER DENYING PRELIMINARY INJUNCTION

This cause is before the Court on plaintiff's Motion for a Preliminary Injunction pursuant to Rule 65, Federal Rules of Civil Procedure.

Plaintiff, Florida Businessmen for Free Enterprise, is an unincorporated association of wholesalers and retailers who sell merchandise which may be classified as "drug paraphernalia," throughout Florida in general and in the city of Homestead, Florida specifically. Plaintiff,

Merlin's Music, Inc. is a record and "novelty gift" shop located in Homestead, Florida.

Plaintiffs seek to preliminarily enjoin the defendant from enforcing the city of Homestead's Ordinance No. 80-04-28 and any and all conduct incidental to the enforcement of that Ordinance, which prohibits the possession, delivery or advertisement of certain items described as "drug paraphernalia."

The plaintiffs submitted a sworn to affidavit in support of their motion. On May 23, 1980 the motion came on to be heard before the Court. Both parties were represented by counsel and brief argument was heard by the Court. The plaintiff stated that he would rely on his sworn to affidavit and put the plaintiffs on the stand for purposes of cross-examination. Plaintiff's counsel stated that Merlin's Music, Inc. was currently losing $18,000 per month revenues based on the Ordinance, which precluded them from selling the "paraphernalia." There was no proffer as to the losses to be sustained by Florida Businessmen for Free Enterprise. The defendant stated that his witnesses would show that business at Merlin's was substantially unchanged prior to and after the enactment of said Ordinance.

The Court is confronted with a situation where a pending case involving a substantially similar statute (enacted by Hollywood, Florida) is before the Honorable Norman C. Roettger, Jr. There appears to be the need for consolidation of these two cases in the interest of judicial economy.

Based upon the abbreviated hearing and the affidavit of plaintiff (note there was neither response nor

memorandum of law submitted by defendant) the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 FRCP.

There are four prerequisites to be considered prior to this Court issuing interlocutory injunctive relief. These elements are well settled in the law and the parties do not question their validity:

1) The likelihood of success on the merits by the moving party,

2) A showing of irreparable harm to the movant should the injunction not be issued,

3) Balancing the harm to movant if injunction not granted, to the harm to opposing party should injunction be granted.

4) Consideration of Public Policy.

Based upon the case law and memorandum provided, the Court finds that there is a substantial likelihood of success on the merits for movant.

In balancing the possible harm to plaintiff and defendant, the Court finds that the facts are not compelling enough to tilt the scales of justice heavily in favor of either party. The same holds true for the Public Policy consideration.

This leaves the Court with the determination of whether the plaintiff has shown that it will suffer irreparable harm should the injunction not be issued.

The plaintiff, Merlin Music, Inc. claims a loss of $18,000 per month revenues due to the Ordinance, and that as a result of said loss "continues to suffer a substantial loss of income, business, and customers due to compliance with the ordinance, which may result in bankruptcy." The same claim was made for plaintiff, Florida Businessmen, but no loss figures were presented. Neither in sworn to affidavit nor in the proffer of counsel was there any indication of gross revenues so as to more accurately determine whether the reduction in revenues was so substantial that it would cause irreparable harm or possibly bankruptcy to plaintiff. The Court is aware of *Doran v. Salem* that stood for the proposition that if a showing of substantial loss of business was shown, perhaps amounting to possible bankruptcy, the requisite irreparable harm element would have been met. However, in Doran, *supra*, the court stated:

> "* * * respondents alleged (and petitioner did not deny) that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy."

It is not known what proffer of irreparable harm was made to that court. In any event, no denial was made.

This Court finds that there has not been a showing of irreparable harm to plaintiff, Merlin Music, Inc., nor to plaintiff, Florida Businessmen.

In addition, and perhaps even more compelling to this Court, is the problem of adequate remedy at law. The equity jurisdiction of this Court should not be

invoked unless there is no adequate remedy at law. This area necessarily fits within the category of irreparable harm to plaintiff.

In *Wooley v. Maynard*, 430 U.S. 705 (1976) the Court dealt with the problem of a federal court enjoining the enforcement of a state statute and said,

> "It is correct that generally a court will not enjoin "the enforcement of a criminal statute even though unconstitutional," Spielman Motor Co. v. Dodge, 295 U.S. 89, 95 (1935), since "[s]uch a result seriously impairs the concerns for federalism which lie at the heart of Younger," Doran, supra, at 931. But this is not an absolute policy and in some circumstances injunctive relief may be appropriate. "To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." Spielman Motor Co., supra, at 95. We have such a situation here for, as we have noted, three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. This is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time * * *"

In the case at bar the plaintiffs have not been harassed, nor have bad faith prosecutions been carried out. Instead, as the Court distinguishes in *Wooley*, we are confronted here with a prosecution that is threatened for the first time. Therefore, it does not appear that injunctive relief is appropriate. Further, if the Ordinance

is ultimately found to be invalid plaintiff may have a civil suit for damages against the city of Homestead for economic losses suffered. This would constitute an adequate remedy at law. There has been no proffer that such a remedy does not exist or that in the alternative it is inadequate.

Based on the affidavit, comments of counsel, and being otherwise duly advised it is

ORDERED and ADJUDGED that plaintiff's Motion for a Preliminary Injunction is denied.

DONE and ORDERED at West Palm Beach, Florida, this 23rd day of May, 1980.

/s/ James C. Paine
United States District Judge

cc: Simon, Schindler & Tripp, P.A.
City Attorney

[FILED FEB 26 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-1160-Civ-NCR

FLORIDA BUSINESSMEN FOR FREE ENTERPRISE, et al.,

Plaintiffs,

vs.

THE CITY OF HOMESTEAD, FLORIDA, etc.,

Defendants,

FINAL JUDGEMENT

This cause came on for hearing before the Court, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the plaintiffs take nothing, that the action be dismissed on the merits, and that defendants recover of plaintiffs their costs of action.

DONE and ORDERED this 25th day of Feb, 1981.

/s/ Norman C. Roettger Jr.

CC: Simon, Schindler & Tripp
Kuvin, Klingensmith & lewis

RESOLUTION NO. 80-07-21

A RESOLUTION OF THE CITY OF HOMESTEAD, FLORIDA, STAYING THE ENFORCEMENT OF ORDINANCE NO. 80-04-28, PROSCRIBING THE SALE AND DELIVERY OF CERTAIN ITEMS VARIOUSLY DESCRIBED AS "DRUG PARAPHERNALIA" AND SETTING FORTH THE CONDITIONS UNDER WHICH SAID STAY OF ENFORCEMENT SHALL BE OPERABLE.

WHEREAS, there is pending in the United States District Court for the Southern District of Florida litigation involving the City of Homestead and certain merchants claiming abridgement of the constitutional rights respecting the sale and delivery of certain articles deemed under Ordinance No. 80-04-28 to be "drug paraphernalia" and,

WHEREAS, the city's legal counsel has advised that damages claimed by the plaintiffs should be mitigated in the eventuality of a judgment against the city and,

WHEREAS, it is in the best interest of the city that such damages, if any, should be mitigated to the greatest degree practicable:

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF HOMESTEAD, DADE COUNTY, FLORIDA:

That the enforcement of Ordinance No. 80-04-28 be and is hereby stayed until final resolution of case

no. 80-1160 Civ-JCP now pending in the United States District Court for the Southern District of Florida and only upon the following conditions:

1. That the plaintiffs make no sales or deliveries to minors, of proscribed articles, in the City of Homestead.

2. That all items cognizable under Ordinance No. 80-04-28 be kept either under lock and key or otherwise physically inaccesible to all persons except plaintiffs' employees.

3. That appropriate signs be posted conspicuously on plaintiff's premises in the City of Homestead to the effect that such items are not to be sold to minors.

4. That all advertisements of plaintiffs promoting the sale or delivery of such items be appropriately captioned to the effect that such items are not for sale or delivery to minors.

5. That plaintiffs submit to reasonable inspections for compliance by agents of the City of Homestead.

PASSED AND ADOPTED this 7th day of July, 1980.

/s/ [Illegible]
Mayor-Councilman

ATTEST:

/s/ Edna B. Pinder
City Clerk

APPROVED AS TO FORM AND CORRECTNESS:

/s/ [Illegible]
City Attorney